Santa Clara Law Review

Volume 37 | Number 3 Article 1

1-1-1997

Outside the Compensation Bargain: Protecting the Rights of Workers Disabled on the Job to File Suits for Disability Discrimination

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ARTICLES

OUTSIDE THE "COMPENSATION BARGAIN:" PROTECTING THE RIGHTS OF WORKERS DISABLED ON THE JOB TO FILE SUITS FOR DISABILITY DISCRIMINATION

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I. INTRODUCTION

> An employee is injured at work. After recovering from her injury she is terminated from her employment. May she sue her employer in court for discrimination because of her physical disability? Yes. Under [California] Government Code section 12993, subdivision (a), she is not barred from doing so by the workers' compensation laws.[1]

So begins the landmark case of *City of Moorpark v. Superior Court* (hereinafter *"Dillon"*), the first case to argue that discrimination for an industrial injury should not be treated differently than discrimination for non-industrial injuries in the workplace.

Until recently, a worker injured on the job could not bring a lawsuit for employment related disability discrimination, while a worker injured off the job could. The person injured off the job enjoyed a full range of civil legal remedies that the person injured on the job did not enjoy. Workers who were disabled on the job, and then discriminated against, were limited to workers' compensation penalties.

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1. City of Moorpark v. Superior Court, 57 Cal. Rptr. 2d 156, 158 (Ct. App. 1996) (decided by the 2nd Appellate District, Division 6), *review granted*, No. S057121 (Nov. 26, 1996) [hereinafter Dillon].

The *Dillon* case not only reverses long standing precedent that workers' compensation is the exclusive remedy for workplace disability discrimination, it has also caused a split in a California Court of Appeal district, District Two. This split, and the underlying important public policy considerations concerning the rights of the disabled, has invited California Supreme Court review. The decision in *Dillon* is the opposite of the District Two decision in *Cammack v. GTE Corp.*[2] Both cases address the same issue: Does a 1993 amendment to the state's Fair Employment and Housing Act[3] (hereinafter "FEHA") allow an injured worker to file suit in state court for violation of the FEHA, for discrimination on the basis of disability?

In *Dillon*, a secretary for the city suffered a knee injury at work, and filed a workers' compensation claim.[4] She was off work for the knee surgery, but after her recovery, her doctor released her to return to work.[5] However, when she returned, her supervisor told her she had been terminated from work.[6] Dillon did inform the city she would still like to return to work if certain accommodations for her disability could be made, but was told the city would not re-hire her.[7] She filed a discrimination claim under the FEHA, and the Fair Employment Housing Commission (hereinafter "FEHC") authorized her to bring a civil suit.

The city demurred to Dillon's complaint, arguing that workers' compensation was Dillon's exclusive remedy.[8] The Superior court overruled the demurrers to the causes of action for discrimination and wrongful termination, and the City filed a writ of mandate.[9]

The court expressly rejected the City's contention that Dillon's sole remedy was under Labor Code § 132a of the Workers' Compensation Act, holding it did not fall into the

2. 55 Cal. Rptr. 2d (Ct. App. 1996) (decided by the 2nd Appellate District, Division 5), *review granted,* No. S056183 (Nov. 26, 1996). It is not certain whether the Court will review both cases together, or one at a time.

3. CAL. GOV'T CODE § 12993 (West Supp. 1996). This amendment became effective January 1, 1994.

4. *Dillon,* 57 Cal. Rptr. 2d at 158.

5. *Id.*

6. *Id.*

7. *Id.*

8. *Id.*

9. *Id.*

"so-called compensation bargain."[10] The court stated that prior cases[11] holding an employee's claim of disability discrimination, arising out of a work related injury, was pre-empted by the workers' compensation law, were no longer applicable because of recent amendments to the state's Fair Employment and Housing Act.[12]

The FEHA declares it is the public policy of this state to "protect individuals from discrimination in employment matters on the basis of physical handicap," among other things.[13] It is unlawful to terminate a person based on physical handicap.[14] Cal. Gov't Code § 12993(a) provides that "nothing contained in this part shall be deemed to repeal any provision of the Civil Rights Law or of any other law of this state relating to discrimination because of race, religious creed, color, national origin, ancestry, physical disability, mental disability, medical condition, marital status, sex or age."[15] In 1993, the California Legislature amended § 12993 with the following phrase: "unless those provisions provide less protection to the enumerated classes of persons covered under this part."[16]

Before this amendment, discrimination for workplace disability was pre-empted by Labor Code § 132a,[17] part of the

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10. *Dillon*, 57 Cal. Rptr. 2d at 159.

11. The court specifically mentioned the cases of *Langridge v. Oakland Unified Sch. Dist.*, 31 Cal. Rptr. 2d 34 (Ct. App. 1994); *Angell v. Peterson Tractor Inc.*, 26 Cal. Rptr. 2d 541 (Ct. App. 1994); and *Usher v. American Airlines, Inc.*, 25 Cal. Rptr. 2d 335 (Ct. App. 1992).

12. *Dillon*, 57 Cal. Rptr. 2d at 160.

13. CAL. GOV'T CODE § 12920 (West Supp. 1996).

14. *See id.* § 12940. Some exceptions do apply.

15. CAL. GOV'T CODE § 12993(a) (West Supp. 1996).

16. *Id.* The provision became effective on January 1, 1994. *See* A.B. No. 2244, 1993-1994 Reg. Sess., 1993 Cal. Legis. Serv. ch. 1977, § 15 (West).

17. Section 132a provides:

> It is the declared policy of this state that there should not be discrimination against workers who are injured in the course and scope of their employment. Any employer who discharges, or threatens to discharge, or in any manner discriminates against any employee because he or she has filed or made known his or her intention to file a claim for compensation with his or her employer or an application for adjudication, or because the employee has received a rating, award, or settlement, is guilty of a misdemeanor and the employee's compensation shall be increased by one-half, but in no event more than ten thousand dollars ($10,000), together with costs and expenses not in excess of two hundred fifty dollars ($250). Any such employee shall also be entitled to reinstatement and reimbursement for lost wages and work benefits caused by the acts of the employer.

CAL. LAB. CODE § 132a (West Supp. 1996).

Workers' Compensation Act. As the remedies in § 132a are fairly limited, and the remedies for civil damages under the FEHA are far more extensive, the *Dillon* court applied this amendment to such discrimination cases, and held "the plain meaning of the statute" allows a worker to bypass the exclusive remedy provisions of workers' compensation.[18]

In *Dillon*, one division of the Second District of the Court of Appeal split with another division, which decided the same issue a month earlier, but came to the opposite conclusion. In *Cammack v. GTE Corp.*,[19] the court held the amendment to § 12993 did not repeal the pre-emptive effect of Labor Code § 132a. There, an employee suffered a carpal tunnel injury disability.[20] He requested a "reasonable accommodation" at work, but was terminated soon after his workers' compensation benefits expired.[21] The worker filed a lawsuit under the FEHA, and defendants demurred to the suit.[22] The demurrer was sustained and the employee filed an appeal.[23]

The *Cammack* court stated the sole issue on appeal was whether the plaintiff's FEHA discrimination claim based on termination for a work-related injury was pre-empted by the Workers' Compensation Act.[24] This court ruled that it was, for a number of reasons.[25] First, it believed the claim fell within the "compensation bargain."[26] Second, after reviewing the legislative history of the Act, it ruled that the amendment to § 12993 was intended to correct remedies in the *housing* aspects of the law, not the employment area of the law.[27] Third, it believed the Legislature did not intend to have the amendment to § 12993 act as a repeal for Labor Code § 132a.[28]

This article will explore the conflicting reasoning behind *Dillon* and *Cammack*, and the historic "compensation bargain" to determine if the *Dillon* court was correct in finding

18. *Dillon*, 57 Cal. Rptr. 2d 156, 160 (Ct. App. 1996).
19. 55 Cal. Rptr. 2d 837 (Ct. App. 1996).
20. *Id.* at 840.
21. *Id.*
22. *Id.* at 841.
23. *Id.*
24. *Id.* at 842.
25. *Cammack*, 55 Cal. Rptr. 2d at 842.
26. *Id.* at 844. *See* discussion *infra* Part II.A (discussing the "compensation bargain").
27. *Id.* at 850-51.
28. *Id.* at 848.

that discrimination based on disability is outside the workers' compensation bargain.[29] It will explain the separate policy goals behind workers' compensation laws, and the civil rights laws contained in the FEHA.[30] It will also explore the cases prior to *Dillon* and the conflict between the FEHA and the Workers' Compensation Act.[31] These are the tasks that lie ahead for the California Supreme Court, which is faced with the important policy consideration of treating all disabled workers equally when discriminated against at work, regardless of where their injury or disability occurs.

II. BACKGROUND

A. *The Historic "Compensation Bargain"*

Many of the past decisions concerning whether disability discrimination was pre-empted by Labor Code § 132a relied on the often cited "compensation bargain."[32] The compensation bargain involves the employer assuming liability for industrial personal injury or death without regard to fault, in exchange for protection against civil liability.[33] The idea is that employees would be afforded swift and certain payment of benefits to cure or relieve the effects of an industrial injury without having to prove fault, but in exchange, give up the wider range of damages potentially available in tort.[34] The Supreme Court has held that the compensation bargain must stem from "a risk reasonably encompassed within the compensation bargain."[35]

The basis of compensation and the exclusive remedy provision is that there must be an injury sustained "arising out of and in the course of employment."[36] Section 3601 specifically provides "the right to recover such compensation, pursuant to the provisions of this division is, except as specifically provided in this section, the exclusive remedy for *injury or death* of an employee."[37]

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29. *Id.* at 853.
30. *See infra* Part III.
31. *See infra* Part III.
32. *See, e.g.*, Shoemaker v. Myers, 801 P.2d 1054 (Cal. 1990).
33. *Id.* at 16.
34. *Id.*
35. Cole v. Fair Oaks Fire Protection Dist., 729 P.2d 743, 747 (Cal. 1987).
36. CAL. LAB. CODE §§ 3600-01 (West 1989 & Supp. 1996.)
37. *Id.* § 3601 (emphasis added).

The courts have spent enormous amounts of time over the years determining what fits within the exclusive remedy rule and compensation bargain. The courts recognize that it should be limited to personal, physical or mental injury or death as provided by the statute. There have been numerous circumstances where the courts have decided that certain claims or causes of action are outside the compensation bargain, including the following: a claim for violations of the FEHA based on gender discrimination,[38] race discrimination,[39] religious discrimination,[40] where the employer or insured stepped out of their proper roles and engaged in fraud,[41] where the employer engaged in tortious discharge in contravention of public policy,[42] where the employer conducts a deceitful investigation of an employee,[43] where an employee's termination violates the whistle blower statute,[44] where an employer sexually harasses an employee and causes emotional distress,[45] and for civil suits for false imprisonment of an employee.[46]

Looking back at what the Legislature initially intended by the historic tradeoff of rights in the "compensation bargain," it is clear that only suits involving personal injuries

38. B & E Convalescent Ctr. v. State Compensation Ins. Fund, 9 Cal. Rptr. 2d 894, 896-98 (Ct. App. 1992).

39. Jones v. Los Angeles Comm. College Dist., 244 Cal. Rptr. 37 (Ct. App. 1988) (race discrimination).

40. Goldman v. Wilsey Foods, Inc., 265 Cal. Rptr. 294 (Ct. App. 1989).

41. Johns Mansfield Prods. Corp. v. Superior Court, 612 P.2d 948 (Cal. 1980) (finding that workers' compensation was not the exclusive remedy for injuries caused by an employer's failure to notify the employee of known health risks).

42. Gantt v. Sentry Ins., 824 P.2d 680 (Cal. 1992).

43. Maguilo v. Superior Court, 121 Cal. Rptr. 621 (Ct. App. 1975) (finding that the legislature did not intend to scope an objective of the exclusive remedy provision to include intentional assault).

44. *See* Shoemaker v. Myers, 801 P.2d 1054 (Cal. 1990); CAL. GOV'T CODE § 19683 (West. 1995) (CAL. GOV'T CODE § 19683 is also referred to as the "whistleblower protection law").

45. Meniga v. Raleys, Inc., 264 Cal. Rptr. 319 (Ct. App. 1989) (allowing claims for employment discrimination, defamation, intentional infliction of emotional distress and loss of consortium, and concluding that the FEHA prevailed over workers' compensation because the statute and public policy were over-riding).

46. Fermino v. FedCo, Inc., 872 P.2d 559 (Cal. 1994) (holding that a civil suit for false imprisonment of an employee suspected of stealing the proceeds of a retail sales is not barred because the tort of false imprisonment involves criminal conduct and for that reason is outside the compensation bargain).

arising out of negligence were originally contemplated.[47] Workers' Compensation laws[48] came about at the turn of the century because workers were often thwarted in their attempts to sue for negligence.[49] Not only did the employee have to establish the employer's negligence to recover for industrial accidents, but employers could bribe coroners and police to rule the accident was the employee's fault.[50] The laws also allowed even the negligent employer to avoid liability through the defenses of contributory negligence, assumption of risk, or the fellow servant doctrine, the "three wicked sisters of the common law."[51]

Because of the difficulty for the employee to prove negligence, and because the employer wanted to avoid large dam-

47. *See* Richard A. Epstein, *The Historical Origins and Economic Structure of Workers' Compensation Law*, 16 GA. L. REV. 775, 797 (1982).

48. *See* Federal Employer's Liability Act, ch. 149, 35 Stat. 65 (1908) (currently codified at 45 U.S.C. §§ 51-60 (1972)).

49. Philip D. Oliver, *Once is Enough: A Proposed Bar of the Injured Employee's Cause of Action Against a Third Party*, 58 FORDHAM L. REV. 117, 124 (1989). *See also* Thompson, *Under What Circumstances a Servant Accepts the Risk of His Employment*, 31 AM. L. REV. 82 (1897), which contains this view of the rights of injured workers:

> I do not want my professional brethren to think for one moment that I balance the life of a railway brakeman against the slight expense to a railway company of blocking its frogs and switches. I should be sorry to have them think that I ever was willing to balance the life of a railway brakeman against the slight expense to a railway company of building the upper works of its bridges sufficiently high for a brakeman to stand upon the top of his car without coming in contact with them. These are murder-machines; and the rule of judge-made law which holds the servant at all times and under all circumstances, bound to avoid them at his peril, is a draconic rule. It is destitute of any semblance of justice or humanity. It is cruel and wicked. It illustrates the subserviency of the American judiciary to the great corporations . . . [I]t puts the wealthy capitalist, corporate or unincorporate, upon the same equality in this respect, as that of the starving laborer, who must carry his meager dinner pail to his employment, no matter how dangerous it may be, in order to get a little food, clothing and shelter for his suffering family. . . . Those who can reconcile their consciences to the cold brutality of the general rule with reference to the servant accepting the risk, are at liberty to do so; I envy neither their heads nor their hearts.

Id. at 85-86.

50. PHILIP S. FONER, THE HISTORY OF THE LABOR MOVEMENT IN THE UNITED STATES 22 (1964). *See also* Ellyn Moscowitz & Victor Van Bourg, *Carve-outs and the Privatization of Workers' Compensation in Collective Bargaining Agreements*, 46 SYRACUSE L. REV. 1, 7 (1995).

51. Dean Prosser coined this phrase in describing the conundrum that workers found themselves in at the turn of the century. W. PROSSER & P. KEETON, THE LAW OF TORTS § 75, at 536 (5th ed. 1984).

age awards if an employee *was* able to prove negligence, this historic "trade-off" (the so-called "compensation bargain") was conceived.[52] The workers' compensation system was enacted to be a "no-fault" system, whereby the employee would receive quick, easy access to medical care, paid for by the employer, and to compensate the employee's wage loss during the period of disability.[53] This system was in exchange for the employer's right to remain free from civil liability for personal injury or death.[54] Although employers initially contested these laws as an unconstitutional violation of their due process rights, by 1913, most states had viable workers' compensation laws.[55]

Claims for employment discrimination can be based on race or sex discrimination, intentional or negligent infliction of emotional distress, or wrongful termination in violation of public policy. None of these claims even existed at the time of this historic bargain. Discrimination is not ever a tort; it is a violation of civil rights.[56] The "compensation bargain" could not possibly have included a trade-off of civil rights because the cause of action for civil rights did not yet exist at the time workers' compensation legislation was enacted. Over the years, the courts have expounded on what should be included or excluded in this compensation bargain, often ignoring the realities of the bargain's very roots. When determining what falls within the compensation bargain, an accurate historical perspective must be applied to avoid the evolution of a one sided bargain. There needs to be some limit on the types of claims courts include in this bargain. Otherwise, the bargain will become no bargain at all.

What was initially intended? The first cases to address the employers liability in tort for its employee's injuries date

52. *See* ARTHUR R. LARSON, THE LAW OF WORKMEN'S COMPENSATION § 5.20, at 25 (1989).

53. *See* WARREN HANNA, CALIFORNIA LAW OF EMPLOYEE INJURIES AND WORKERS' COMPENSATION § 1.01[2] (rev. 2d ed. 1995). *See also* Leslie H. Kawaler, Note, *Intentional Torts Under Workers' Compensation Statutes: A Blessing or a Burden?*, 12 HOFSTRA L. REV. 181, 183 (1983).

54. HANNA, *supra* note 53, at § 1.102[2].

55. *See* Ives v. South Buffalo Ry. Co., 94 N.E. 431 (N.Y. 1911).

56. *See* Sterling Transit Co. v FEPC, 175 Cal. Rptr. 548, 549 (Ct. App. 1981) ("Every person's civil right to obtain and hold employment without discrimination . . . on account of a physical handicap is guaranteed under the public policy of this state.").

back to 1837. Two cases, *Priestly v. Fowler*,[57] an English case, and *Murray v. South Carolina*,[58] an American case, discussed the nature of the employment relationship and the employer's liability for negligent harm to their employees. These courts did not conclude that the employers owed a duty of care to its employees. They were only the first to *discuss* the idea. Yet after these cases, there were few other cases discussing the employer's duty of care to its employees until the 20th century.

> To say that there was no law on the subject before these epic cases were handed down would be an error. The utter dearth of cases upon the subject indicates, clearer than any judicial opinion could proclaim, an ironclad rule of breathtaking simplicity: *no* employee could *ever* recover from *any* employer for *any* workplace accident - period. In retrospect, the legal outcome could be delicately phrased by saying that the employer owed no duty of care to the employee, that the employee assumed the risks of all injuries associated with his employment, or that the employer was wholly immune, not unlike the sovereign himself, from legal accountability. Such conclusions were not stated, let alone justified. Silence said it all: an employee should be grateful for the opportunity for gainful employment. That he should receive any special legal protection on top of his good fortune was quite unthinkable. In a society in which disease and injury were rampant, and life itself fragile and short, the result should not come as too much of a surprise. Why should the legal system intervene on behalf of those fortunate enough to gain employment when there were countless others, far worse off, who would gladly trade places with them? . . . No successful action for an industrial accident had been brought prior to these [*Priestly* or *Murray*] suits. Afterwards, nothing had changed.[59]

In 1880, the first laws to address employer liability for negligence were passed in England[60] and became the model

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57. 150 Eng. Rep. 1030 (Ex. 1837).

58. 26 S.C.L. (1 McMul.) 385 (1841).

59. Epstein, *supra* note 47, at 777-78. *See also* H. SOMERS & A. SOMERS, WORKMEN'S COMPENSATION 17 (1954) (noting that employees rarely brought suits against their employers for work related injuries in the nineteenth century).

60. Employer's Liability, 1880, 43 & 44 Vict. ch. 42 (Eng.).

for several jurisdictions in the United States.[61] The English act shows that workers' compensation began as compensation for negligence only. The law stated, in pertinent part:

> 1. Whereafter the commencement of this Act *personal injury* is caused to a workman
>
> (1) By reason of any defect in the condition of the ways, works, machinery, or plant connected with or used in the business of the employer; or
>
> (2) By reason of the negligence of any person in the service of the employer who has any superintendence entrusted to him whilst in the exercise of such superintendence; or
>
> (3) By reason of negligence of any person in the service of the employer to whose orders or directions the workman at the time of injury was bound to conform, and did conform, where such injury resulted from his having so conformed; or
>
> (4) By reason of the act or omission of any person in the service of the employer done or made in obedience to the rules or bylaws of the employer, or in obedience to particular instructions given by any person delegated with the authority of the employer in that behalf; or
>
> (5) By reason of the negligence of any person in the service of the employer who has the charge or control of any signal, points, locomotive engine, or train upon a railway,
>
> the workman, or in case the injury results in death, the legal personal representatives of the workman, and any persons entitled in case of death, shall have the same right of compensation and remedies against the employer as if the workman had not been a workman of nor in the service of the employer, nor engaged in his work.
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> 2. A workman shall not be entitled under this Act to any right of compensation or remedy against the employer in any of the following cases; that is to say,

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61. *See, e.g.*, Federal Employers' Liability Act, ch. 149, 35 Stat. 65 (1908) (codified as amended at 45 U.S.C. §§ 51-59 (1976)); Federal Employers' Liability Act, ch. 3073, 34 Stat. 232 (1906) (declared unconstitutional); Act of March 6, 1907, ch. 97, 1907 Cal. Stat. 119 (current version at CAL. LAB. CODE §§ 2803, 2804 (West 1989)); Act of May 14, 1887, ch. 270, 1887 Mass. Acts 899 (current version at MASS. GEN. LAWS ANN. ch. 153 (West 1958)). The Employers' Liability Cases No.1, 207 U.S. 463 (1908) (declared the first of federal statutes unconstitutional); Second Employers' Liability Cases, 223 U.S. 1 (1911) (upholding the second of the federal statutes).

(1) Under the sub-section one of section one, unless the defect therein mentioned arose from, or had not been discovered or remedied owing to the negligence of the employer, or of some person in the service of the employer, and entrusted by him with the duty of seeing that the ways, works, machinery, or plant were in proper condition.

(2) Under sub-section four of section one, unless the injury resulted from some impropriety or defect in the rules, bylaws, or instructions therein mentioned; provided that where a rule or bylaw has been approved or has been accepted as a proper rule or bylaw of one of Her Majesty's Principal Secretaries of State, or by the Board of Trade or any other department of the Government, under or by virtue of any Act of Parliament, it shall not be deemed for the purposes of this Act to be an improper or defective rule or bylaw.

(3) In any case where the workman knew of the defect or negligence which caused his injury, and failed within a reasonable time to give, or cause to be given, information thereof to the employer or some person superior to himself in the service of the employer, unless he was aware that the employer or such superior already knew of the said defect or negligence.[62]

Thus, this first step towards workers' compensation was clearly limited to *physical* injuries resulting from negligent acts. This enactment was an extreme step from the concept of no liability at all, imposing as it did a moral and legal obligation to employees when the employer's negligence caused the harm.

The next real step was taken in 1897, in England, with the passage of the Workmen's Compensation Act of 1897.[63] This statute became the model for subsequent American statutes.[64]

In the new law, negligence was removed as a condition of liability. The replacement language used today, "personal injury by accident arising out of and in the course of employment" was added.[65] Although this first workers' compensation statute was limited to certain categories of employees,[66]

62. Employer's Liability, 1880, 43 & 44 Vict. ch. 42 (Eng.).
63. Workmen's Compensation, 1897, 60 & 61, Vict. ch. 37 (Eng.).
64. Epstein, *supra* note 47, at 797.
65. *Id.*
66. Railway, factory, mine, quarry or engineering work. *Id.*

it began the establishment of the "no-fault" concept for personal injuries arising out of the employment relationship.

Under the new law, employer defenses were also eliminated, to comport with the no-fault concept. The statute did not disallow the common law of tort against the employer entirely, rather it kept the right to sue for intentional torts by the employer.[67]

The early language of workers' compensation acts form the basis of the compensation bargain. The broad coverage of the "new" workers' compensation laws at the turn of the century eliminated the need to prove negligence on *both* sides, as well as the defenses of assumption of risk or fellow servant rule.[68]

This history shows that the fundamental basis for the compensation bargain was in tort law only, specifically the law of negligence. An employee was compensated for the "wrong" of physical injury. Violations of civil rights in the workplace were not contemplated. Employment discrimination, a civil rights issue,[69] was not established as a viable cause of action until 1964, with the passage of the Civil Rights Act.[70] The idea that there was a trade-off of civil rights actions, along with tort actions, as remedies covered by workers' compensation laws, is unsupported by any workers' compensation statute or by any logical reading of legislative history.

B. *Labor Code §132a*

The California courts have created an anomaly to the detriment of disabled workers. They have agreed that race discrimination, sex discrimination, and age discrimination are not part of the compensation bargain, yet they treat disability discrimination differently. This anomaly is a result of a provision in the Workers' Compensation Act, Labor Code § 132a, that prohibits discrimination on the basis of disability.[71]

Labor Code § 132a provides: "It is the declared policy of this state that there should not be discrimination against

67. *Id.*
68. *See supra* text accompanying note 48.
69. *See* Ives v. South Buffalo Ry. Co., 94 N.E. 431 (N.Y. 1911).
70. 42 U.S.C. §§ 2000e-h (1986).
71. CAL. LAB. CODE § 132a (West Supp. 1996); *see supra* note 17.

workers who are injured in the course and scope of their employment."[72] California is one of twenty-seven jurisdictions that provide a statutory remedy for retaliatory discharge based on filing a workers' compensation claim.[73] Section 132a was enacted originally to provide protection from retaliation for filing a workers' compensation claim or testifying in a workers' compensation proceeding.[74] It was never intended to serve the same purpose as recent laws, such as the Americans with Disabilities Act[75] (hereinafter "ADA") and FEHA,[76] which protect against disability discrimination in a *variety* of ways. Most notably, it was never intended to compel an employer to accommodate a worker's disability in the workplace, and no such language exists in § 132a.

Section 132a *does* penalize an employer who "discharges, or threatens to discharge, or in any manner discriminates against an employee because he or she has filed or made known his or her intention to file a [workers' compensation] claim."[77] The penalty for such discrimination is to increase the employee's compensation by one-half, but in no case by more than $10,000.[78] The employee can also be reinstated and reimbursed for lost wages and work benefits caused by the acts of the employer.[79]

These penalties do not come close to the "make whole" remedies of the FEHA. Under the FEHA, an employee can recover all civil damages arising from tort and contract, including damages for pain and suffering, loss of consortium and loss of earnings[80] and can also seek punitive damages.[81] As stated by the court in *Dillon*, "[t]he FEHA provides remedies to eliminate discriminatory practices and a civil action to

72. CAL. LAB. CODE § 132a (West Supp. 1996).

73. Jean C. Love, *Retaliatory Discharge for Filing a Workers' Compensation Claim: The Development of a Modern Tort Action*, 37 HASTINGS L.J. 551, 554 (1986).

74. *See* 1972 Cal. Stat. 874.

75. Americans with Disabilities Act, Pub. L. No. 101-336, 104 Stat. 327 (1990), 42 U.S.C. §§ 12101-213 (Supp. IV 1992).

76. CAL. GOV'T CODE § 12993 (West Supp. 1996).

77. CAL. LAB. CODE § 132a(1) (West Supp. 1996).

78. *Id.*

79. *Id.*

80. *Dillon*, 57 Cal. Rptr. 2d 156, 162 (Ct. App. 1996).

81. CAL. GOV'T CODE § 12970(a)(3) (West Supp. 1996).

make the victim whole. The purpose of the workers' compensation law, on the other hand, is that of rehabilitation."[82]

Labor Code § 132a was interpreted more broadly to protect workers rights in *Judson Steel*.[83] There, an employee who was out on disability for a work-related injury, was terminated during a lay-off.[84] The employer did not take into account the employee's seniority status, as required by the union contract.[85] The Court found the employer was not compelled by the Collective Bargaining Agreement to terminate the employee's seniority rights, or his employment, and did so in violation of § 132a.[86]

The *Judson Steel* Court stated that § 132a declares a "broad general policy condemning discrimination against workers who are injured in the course of their employment."[87] The employer argued that 132a was enacted only to protect an employee from retaliatory discharge for filing a claim.[88] However, the court stated the 1972 amendment to § 132a added a broader policy statement to the statute: "there should be no discrimination against workers who are injured in the course and scope of their employment" to the statute.[89] The court explained that the Legislature intended this amendment to change prior law which singled out certain discriminatory acts and to declare a more general policy in favor of preventing all discrimination against injured employees.[90]

The court held "those situations in which an employee is penalized solely because he was injured on the job or had to lose time from work because of a work injury (rather than for example, situations in which the employer reasonably believes that the employee's injury prevents him from being able to do his job in an appropriate manner) are within the scope of § 132a."[91]

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82. *Dillon*, 57 Cal. Rptr. 2d at 162.

83. Judson Steel Corp. v. Workers' Compensation Appeals Bd., 586 P.2d 564 (Cal. 1978).

84. *Id.* at 566.

85. *Id.*

86. *Id.* at 569

87. *Id.* at 570.

88. *Id.* at 568.

89. *Judson Steel,* 586 P.2d at 570.

90. *Id.*

91. *Id.*

At the time § 132a of the Labor Code was enacted in 1941,[92] there were no specific laws protecting workers from workplace disability discrimination. The California FEHA was enacted in 1959,[93] but did not include disability discrimination in its protections until 1974.[94] The Americans with Disabilities Act (ADA) was not enacted until 1990.[95] These laws are more specific in correcting discrimination in the workplace, and deal with accommodations for workplace disability. Labor Code § 132a does not.

The ADA was passed to "provide clear, strong, consistent enforceable standards addressing discrimination against individuals with disabilities."[96] It allows a broad range of remedies for physical and mental disability coverage.[97] Furthermore, since the passage of the Civil Rights Act of 1991,[98] a victim can request general and punitive damages in addition to loss of earnings where an employer fails or refuses to make a good faith effort at accommodation.[99] The remedies provided in Labor Code § 132a do not even come close to providing the same remedies as the Civil Rights Act.

The language used in the ADA, as well as the FEHA, makes clear that the protections in these statutes are *civil rights*.[100] It is a violation of one's civil rights to discriminate on the basis of disability, just as it is on the basis of race, gender, age or religion. Waivers of the right to sue over violations of those civil rights were not included in the "compensation bargain." It could not have been. The ADA and FEHA did not even exist at the turn of the century when the historic trade-off of rights occurred. Thus, the anomaly created by the California courts is without foundation.

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92. Act of Sept. 13, 1941 Cal. Stat. ch. 401, § 1.

93. CAL. GOV'T CODE § 12993 (West Supp. 1996).

94. *Id.*

95. American with Disabilities Act, Pub. L. No. 101-336, 104 Stat. 327 (1990) (codified as amended at 42 U.S.C. §§ 12101-213 (Supp. IV 1992)).

96. 42 U.S.C. § 12101(b)(2) (1995).

97. *Id.*

98. 42 U.S.C. 2000e (1996).

99. 42 U.S.C. § 1981A(a)(3) (1995).

100. *See* 42 U.S.C. § 12101 (1995) and CAL. GOV'T CODE § 12920 (West Supp. 1996).

C. *Remedies under the FEHA and ADA*

The ADA does not replace state laws regarding disability discrimination.[101] It does, however, set a floor and not a ceiling by disclaiming any "intent to invalidate or limit remedies, rights and procedures of any . . . law of any state . . . that *provides greater or equal protection* for the rights of individuals than are afforded by this Act."[102] Workers' compensation exclusivity could not be used to pre-empt an ADA claim, because the ADA provides for greater remedies and protections. Further, the Supremacy Clause of the United States Constitution and 42 U.S.C. § 12201(b) would mandate the primacy of the ADA.[103]

Title I of the ADA specifically provides that the filing of a workers' compensation claim does not prevent an injured worker from filing a charge of discrimination under the ADA.[104] "Exclusivity" clauses in states' workers' compensation laws barring all other civil remedies related to an injury that has been compensated by a workers' compensation system do not preclude qualified individuals with a disability from filing a claim with the Equal Employment Opportunity Commission (hereinafter "EEOC").[105] The EEOC recognizes that civil rights violations are not part of the compensation bargain relating to tort law, with which the historic trade-off was concerned.

Although California has banned disability discrimination in the workplace since 1974,[106] the Legislature strengthened the FEHA in 1992 by ensuring that the state statute provides as much protection as the ADA.[107] Not only did the Legislature add mental disability to statutory protection,[108] but it

101. *See* Wood v. County of Alameda, 875 F. Supp. 659 (N.D. Cal. 1995).

102. 42 U.S.C. § 12201(b) (1995) (emphasis added).

103. *See* Langridge v. Oakland Unified Sch. Dist., 31 Cal. Rptr. 2d 31, 38 (Ct. App. 1994) (stating that "the Supremacy Clause precludes any state restriction on remedies provided by the ADA.").

104. 42 U.S.C. § 12201 (1995).

105. EQUAL EMPLOYMENT OPPORTUNITY COMM'N, TECHNICAL ASSISTANCE MANUAL ON THE EMPLOYMENT PROVISIONS (TITLE I) OF THE AMERICANS WITH DISABILITIES ACT, at II-11 (Jan. 1992). *See also* Ranko Shiraki Oliver, *The Impact of Title I of the Americans with Disabilities Act of 1990 on Workers' Compensation Law*, 16 U. ARK. L. REV. 327 (1994).

106. CAL. GOV'T CODE § 12940 (West Supp. 1996).

107. *Id.* § 12926(1), *amended by* 1992 Cal. Stat. 911, 912, 913.

108. *See id.* § 12926(1) (West 1992).

also broadened the definitions of all disability to be consistent with the ADA protections.[109]

The 1992 FEHA amendments were part of a broader bill[110] which proclaimed the following:

> It is the intent of the legislature in enacting this Act to strengthen California laws in areas where it is weaker than the Americans with Disabilities Act of 1990 . . . and to retain California law in areas when it *provides more protection for individuals* with disabilities than the Americans with Disabilities Act.[111]

This language from the California Legislature makes it clear that laws within the state concerning disability discrimination should be brought up to the highest protections possible under the law: the law of either the ADA or FEHA.[112] The legislature stated no intent to provide this protection for one class of disabled workers (those injured or disabled outside of the workplace), while excluding the other class of disabled workers (those disabled at work.) Surely the legislature did not intend for one class of disabled workers to have far fewer remedies for discrimination than the other, or it would have specifically stated so.

Indeed, less than one year after the effective dates of the 1992 amendments to the FEHA, the California Legislature underscored its concern that the new laws be *fully* implemented by specifically taking into account the claims of injured workers.[113] The Legislature ordered the Division of Workers' Compensation to publicize and inform injured workers of their rights, not only under the workers' compensation laws, but also under the ADA and FEHA.[114] The Legislature

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109. Relevant language appears in § 12926(1) provides:

> Notwithstanding subdivisions (i) and (k), if the definition of disability used in the Americans with Disabilities Act of 1990 . . . would result in broader protection of civil rights of individuals with a mental disability or a physical disability . . . then that broader protection or coverage shall be deemed incorporated by reference into, and shall prevail over conflicting provisions of the definitions in subdivisions (i) and (k).

Id. § 12926(l) (West Supp. 1996).

110. A.B. No. 1077, 1991-1992 Reg. Sess., 1992 Cal. Legis. Serv. ch. 913 (West).

111. 1992 Cal. Stat. 913 (emphasis added).

112. *See also* CAL. CODE REGS. tit. 2, § 7285.1(a) (1995), which provides the "strong public policy in favor of employing the handicapped, and the adoption of a liberal construction rule to effectuate the statutory purpose."

113. *See* 1992 Cal. Stat. 913.

114. CAL. LAB. CODE § 139.6 (West 1987), *amended by* 1993 Cal. Stat. 121.

thus acted to strengthen FEHA disability rights to bring them into conformance with the ADA.

However, until *Dillon*, the Court of appeal decisions in the 1990's have ignored this mandate, and focused instead on the "compensation bargain" encompassed in the Workers' Compensation Act.

D. *Prior Cases Exempting Workplace Disability Discrimination*

The first case to hold specifically that workplace disability discrimination was within the purview of Labor Code § 132a, and not the FEHA, was *Pickrel v. General Telephone Co.*[115] There, an employee suffered a back sprain while moving a ladder at work.[116] The employee filed applications with the Workers' Compensation Board, and recovered damages for her injury, which was approved by a Workers' Compensation judge.[117] Later, the employee filed a civil action against the employer alleging termination because of the physical handicap in violation of Government Code § 12940.[118] The physical handicap she complained of in the civil action was the same back problem she suffered on the job.[119] She also alleged the employer would not make reasonable accommodations to allow her to work in any position.[120]

The employee's complaint was dismissed after the Superior court ruled on the employer's demurrer.[121] The case was appealed to the Court of appeal.[122] The Court of appeal stated that the California Constitution vested the legislature with "plenary power to create a complete system of workers' compensation and to enforce liability on the part of employers for industrial injuries to their employees."[123]

The court declared that the statutory scheme of worker's compensation was "exclusive of all other statutory and common law remedies, and substitutes a new system of rights and obligations for the common law rules governing liability

115. 252 Cal. Rptr. 878 (Ct. App. 1988).
116. *Id.*
117. *Id.*
118. *Id.*
119. *Id.* at 878-79.
120. *Id.* at 879.
121. *Pickrel,* 252 Cal. Rptr. at 879.
122. *Id.*
123. *Id.*

of employers for injuries to their employees."[124] However, the court stated that the underlying philosophy of the exclusivity provisions of the workers' compensation system remains that an employer who has complied with the law by securing the payment of benefits through insurance should be immune from *tort action* brought by injured workers.[125] Relying on the Supreme Court decision in *Judson Steel,*[126] the court held that § 132a applied to all employer actions which in any manner discriminate against an industrially injured employee.[127]

The court's reasoning in this initial case was flawed from the beginning. First, the remedies provided for in § 132a of the Labor Code do not provide "substantial justice" to the injured worker, as called for in the Constitution, when compared with the remedies of the Fair Employment and Housing Act. Second, the court ignored its own language which recognized the purpose of the exclusivity rule as the employers ability to remain immune from "tort action" brought by injured workers. Decisions applying to the Fair Employment and Housing Act have consistently referred to the violations therein as civil rights actions, not tort actions.[128] Therefore, an FEHA claim should not be within the compensation bargain because it is not a *tort* action.

However, since this 1988 decision, the Courts of Appeal have continued to interpret the exclusive remedy provisions of Labor Code § 132a to disfavor workers' claims by broadening one side of the compensation bargain. In *Usher v. American Airlines, Inc.*,[129] the court took the "compensation bargain" further, by concluding that the appellant's causes of action for breach of contract and handicap discrimination were subject to the exclusive remedy provisions of Labor Code § 132a.[130]

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124. *Id.*

125. *Id.* at 880 (emphasis added).

126. Judson Steel Corp. v. Worker's Compensation Appeals Bd., 586 P.2d 564 (Cal. 1978).

127. *Id.* at 570.

128. *Accord* County of Alameda v. Fair Employment & Hous. Comm'n, 200 Cal. Rptr. 381 (Ct. App. 1984) (race discrimination), Cook v. Lindsay Olive Growers, 911 F.2d 233 (9th Cir. 1990) (religious discrimination), Raytheon Co. v. Fair Employment & Hous. Comm'n, 261 Cal. Rptr. 197 (Ct. App. 1989) (handicap discrimination), Johnson Controls, Inc. v. Fair Employment & Hous. Comm'n, 267 Cal. Rptr. 158 (Ct. App. 1990) (gender discrimination).

129. 25 Cal. Rptr. 2d 335 (Ct. App. 1993).

130. *Id.* at 336.

There, an employee who was temporarily disabled as a result of an industrial injury to her back and knee, lost her job during the time she was out on disability.[131] The employer attempted to find another job for the employee, but was unsuccessful.[132] The employee filed a petition pursuant to Labor Code § 132a, requesting lost wages, reinstatement and a penalty.[133] However, she also filed a complaint in Superior court raising breach of contract and handicap discrimination claim.[134]

The Superior court in *Usher* granted the employer's motion, citing the *Pickrel* case.[135] The case was appealed to, and reviewed by, the First District Court of Appeal.[136]

Relying first on the *Shoemaker* case, the court discussed that a termination from employment, involving work related disability, is subject to the exclusive remedy provisions unless there is "an express or implied statutory exception where the discharge results from risks reasonably deemed not to be within the compensation bargain."[137] The court stated that since the *Shoemaker* case rested on wrongful termination under the "whistle-blower statute,"[138] the whistle-blower law was the more specific law.[139] If a law is more general, such as the Workers' Compensation Act, the court found that the more specific law would apply.[140]

The court rejected the appellant's attempt to analogize *Shoemaker* to the *Usher* case by arguing that the handicap provisions of the FEHA and the "whistle-blower law" are the more specific law, whereas § 132a of the Labor Code would be the more general law.[141] The court stated that while the FEHA was enacted to protect the right to "seek, obtain and hold employment without discrimination" on specific grounds, the statute expressly states it is not an exclusive remedy and is not to be "deemed to repeal any other provisions of the civil rights law or any other law of the state relat-

131. *Id.*
132. *Id.*
133. *Id.*
134. *Id.* at 337.
135. *Usher,* 25 Cal. Rptr. 2d at 339.
136. *Id.* at 336.
137. *Id.* at 338 (citing *Shoemaker,* 801 P.2d 1054 (Cal. 1990)).
138. CAL. GOV'T. CODE § 19683 (West 1995).
139. *Usher,* 25 Cal. Rptr. 2d at 338.
140. *Id.*
141. *Id.*

ing to discrimination."[142] Of course, at the time this decision was made, the amendment to § 12993(a) was not yet enacted, and did not include the additional language "unless those provisions provide less protection to the enumerated classes of persons covered under this act."[143]

The court reasoned that the Legislature was presumably aware of the exclusivity provisions of the Workers' Compensation Act when it passed the FEHA, yet disclaimed any intent to repeal this pre-existing exclusive remedy for a particular type of discrimination.[144] Since the *Usher* decision in 1993, the Legislature was presumably still aware of the exclusivity provisions of the Workers' Compensation Act; an awareness which surely also existed just one year later in 1994 when the Legislature amended § 12993(a). On the surface, this amendment certainly seems to provide for the greater remedy contained in the FEHA.

The *Angell* case[145] was decided soon after the new amendment to the FEHA took effect, yet the court did not discuss the new law. The statutory amendment was never discussed in this decision. In *Angell*, an employer terminated an employee who was receiving workers' compensation benefits for work-related heart attacks.[146] The employee sued the employer, alleging the employer discriminated against him based on a physical handicap in violation of the FEHA.[147] The court granted the employer's summary judgment motion, finding that the employer's action was pre-empted by the exclusive remedy provision.[148] The court of appeal affirmed.[149]

The *Angell* case was even stronger than earlier court of appeal decisions. It concluded that discrimination based on a work-related physical handicap is a risk *explicitly* included by the Legislature in the compensation bargain.[150]

The court stated that Labor Code § 132a, on its face, only provides a remedy against employers who retaliate for work-

142. *Id.*
143. *See supra* note 12.
144. *Usher*, 25 Cal. Rptr. 2d at 338.
145. Angell v. Peterson Tractor, Inc., 26 Cal. Rptr. 2d 541 (Ct. App. 1994).
146. *Id.* at 543.
147. *Id.*
148. *Id.*
149. *Id.*
150. *Id.* at 551 (relying on Labor Code § 132a).

ers' use of the workers' compensation system.[151] However, the court went on to apply the *Judson Steel* case, contending that any discrimination against an employee based on a work-related injury is covered by § 132a.[152] The court contended that even if Angell was unlawfully terminated because of his work-related heart condition, the termination was in violation of § 132a and the remedies of § 132a are the only remedies available.[153] In citing to *Pickrel*,[154] the court stated that "intervening developments in the law concerning workers' compensation exclusivity" made it necessary to continue the analysis.[155]

The court continued its analysis by relying on the *Shoemaker* case.[156] In *Shoemaker*, the court held the following:

> [D]isabling injuries, whether physical or mental, arising from termination of employment are *generally* within the coverage of workers' compensation and subject to the exclusive remedy provisions, unless the discharge comes within an expressed or implied statutory exception or the discharge results from risks, reasonably deemed not to be within the compensation bargain.[157]

Before *Shoemaker II*, the courts had decided that violations of the FEHA based on age, gender, and race discrimination are not pre-empted by the workers' compensation laws.[158] The causes of action for age, gender and race discrimination fall squarely within those categories of actions which have been held to violate fundamental and substantial public policies delineated in important state statutes and are consequently outside the exclusive remedy provisions of workers' compensation.[159] However, the *Angell* court reviewed the history of the compensation bargain, and held that physical disability discrimination is within the bargain.[160]

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151. *Angell*, 26 Cal. Rptr. 2d at 545.
152. *Id.* (relying on Judson Steel Corp. v. Workers' Compensation Appeals Bd., 586 P.2d 564 (Cal. 1978)).
153. *Id.*
154. *Id.*
155. *Id.*
156. *Id.* at 546.
157. *Angell*, 26 Cal. Rptr. 2d at 546 (quoting Shoemaker v. Myers, 801 P.2d 1054 (Cal. 1990)).
158. *See supra* notes 24-32.
159. *See Angell*, 26 Cal. Rptr. 2d at 551.
160. *Id.* at 548.

The *Angell* court determined that the Legislature intended the workers' compensation law to provide the exclusive remedy for discriminatory termination based on a work-related injury and did not intend to grant or allow additional remedies.[161]

While the *Pickrel* court based its conclusion solely on the fact that Labor Code § 132a specifically provides a remedy for discrimination based on a work-related physical handicap, the *Angell* court went further by stating that the provisions are intended to effectuate and implement the fundamental compensation bargain said to underlie the workers' compensation scheme.[162] The *Angell* court relied on the language of the FEHA and Government Code § 12993, but never the § 12993 amendment. It is apparent that when the *Angell* court rendered its decision, it was not aware of the language added to § 12993, providing for the stronger state remedy.

The amendment issue was finally addressed in *Langridge v. Oakland Unified School District.*[163] There, the court specifically held that physical disability discrimination based on a work-related injury was pre-empted by the exclusive remedy provisions of the workers' compensation law.[164] The plaintiff, a school district employee, wished to return to work after a disability finding, asserting she was able to perform the essential functions of her job with reasonable accommodation.[165] She was not reinstated, and sued the School District under the FEHA claiming physical disability discrimination.[166]

The court first focused on what risks fall within the compensation bargain and relied on the precedence of *Pickrel, Angell,* and *Usher.*[167] However, the court began its discussion with the dissent in *Angell.*[168] There, a dissenting justice argued that the remedies provided by Labor Code § 132a do not fit within the "metaphorical paradigm" of the workers' compensation bargain because "under Labor Code § 132a, the employee must still prove fault - it cannot be assumed that

161. *Id.* at 549-50.
162. *Id.* at 551.
163. 31 Cal. Rptr. 2d 34 (Ct. App. 1994).
164. *Id.* 38.
165. *Id.* 35.
166. *Id.*
167. *Id.* at 35-37.
168. *Id.* at 36.

every dismissed employee with a work-related physical handicap was fired for that reason - and as a consequence payment is neither swift nor certain."[169] The *Langridge* court stated there was some logic to this argument.[170] An employee claiming discrimination must prove detrimental conduct by the employer as a result of the industrial injury to obtain the remedies provided by § 132a.[171] This requirement implies an element of fault by the employer. Such a requirement is theoretically inconsistent with the workers' compensation bargain, which has a "no fault" basis.[172]

However, the court ultimately rejected this argument contending the element of fault in Labor Code § 132a does not take work-related disability discrimination outside the scope of the compensation bargain.[173] The court relied on Labor Code § 4553, which prescribes increased penalties for an employer's serious and willful misconduct in causing injury or death to its employees.[174] It believed the analogy of allowing the penalty and proving fault for serious and willful misconduct, would apply to § 132a as well.[175] The court rejected Langridge's argument that the application of § 132a makes the amendment to the FEHA "totally idle."[176] The court stated the FEHA prescription still applies to all disability discrimination that is not based on work-related injuries.[177] It rejected Langridge's argument that such a distinction violates the Equal Protection Clause by treating persons with work-related disabilities different from those with non-work-related disabilities.[178] It held that the workers' compensation laws which create this different treatment of disabled workers do not violate equal protection.[179]

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169. Angell v. Peterson Tractor, Inc., 26 Cal. Rptr. 2d 541, 552 (Ct. App. 1994).

170. *Landridge,* 31 Cal. Rptr. 2d at 37.

171. *Id.* at 36.

172. *Id.*

173. *Id.*

174. *Id.*

175. *Id.* at 37.

176. *Landridge,* 31 Cal. Rptr. 2d at 37-38.

177. *Id.* at 38.

178. *Id.*

179. *Id.*

III. ANALYSIS OF THE 1994 FEHA AMENDMENT, AND THE *CAMMACK* AND *DILLON* CASES

In *Cammack,*[180] the Court of Appeal for the Second District looked at the plain language of the amended statute, and concluded it could not follow it, because it would effectively "repeal" § 132a.[181] It not only ruled that the amendment to the FEHA had no *implied* repeal of the pre-emptive effect of § 132a, but also concluded that § 132a requires employers to *accommodate* persons disabled by work-related injuries.[182] No other court decisions have interpreted § 132a that broadly.

In *Cammack,* an employee who suffered from bilateral carpal tunnel syndrome became disabled.[183] Later he attempted to return to work before his benefits had expired, and he requested a "reasonable accommodation" at his place of work.[184] The employer refused and the employee was terminated.[185] The Federal EEOC issued a right to sue letter, although the plaintiff eventually decided to file his discrimination case under the state Fair Employment and Housing Act.[186]

The trial court sustained the employer's demurrer, contending that the Workers' Compensation Act was the employee's exclusive remedy.[187] In affirming, the Court of appeal held that a plaintiff's FEHA discrimination claim based on a work-related injury is pre-empted by the Workers' Compensation Act.[188]

The *Cammack* court set out the relevant authority, yet then proceeded to ignore that authority. In construing the workers' compensation statutes, the court cited the California Supreme Court's guidelines for statutory interpretation.

> The rules governing statutory construction are well settled. We begin with the fundamental premise that the objective of statutory interpretation is to ascertain and effectuate legislative intent. In determining intent, we look

180. Cammack v. GTE Corp., 55 Cal. Rptr. 2d 837 (Ct. App. 1996).
181. *Id.*
182. *Id.* at 850.
183. *Id.* at 840.
184. *Id.*
185. *Id.*
186. *Cammack,* 55 Cal. Rptr. 2d at 840.
187. *Id.*
188. *Id.* at 842.

> first to the language of the statute, giving effect to its plain meaning. Although we may properly rely on extrinsic aids, we should first turn to the words of the statute to determine the intent of the legislature. Where the words of the statute are clear, we may not add or alter them to accomplish a purpose that does not appear on the face of the statute or from its legislative history.[189]

Although the court stated its duty was to look at the "plain meaning" of the statute and give the statute its effect unless the words were unclear, it flatly ignored that duty. The words of § 12993 could not be any clearer. The laws of the Fair Employment and Housing Act must be followed, if they provide a stronger remedy than other state laws for the same type of discrimination. There is no dispute that the FEHA provides a stronger remedy than § 132a of the Workers' Compensation Act.

The Court in *Cammack* chose to look at this issue as one of "implied repeal."[190] The court stated that § 12993 (a) did not impliedly act to repeal Labor Code § 132a or §§ 3600, 3602.[191] They discussed the Supreme Court's decision that implied repeals of well established rules of law are disfavored.[192] The court stated it would not presume the existence of such an intent in the absence of an express declaration.[193] The court explained that repeals by implication are not favored and are recognized only when there is no rational basis for harmonizing two potentially conflicting laws.[194] Further, it stated they must assume that when passing a statute, the legislature is aware of existing related laws and that they intend to maintain a consistent body of rules.[195]

Clearly though, the Legislature could rationalize a basis for having conflicting laws here. It probably *was* aware that § 132a of the Labor Code existed to protect employees from being discriminated against for filing workers' compensation claims, yet it still indicated its desire to have the strongest protections possible for disability discrimination, when enact-

189. *Id.* (relying on Burden v. Snowden, 828 P.2d 672 (Cal. 1992)).
190. *Id.*
191. *Id.* at 222.
192. *Cammack,* 55 Cal. Rptr. 2d at 848 (citing Manufacturers Life Ins. Co. v Superior Court, 895 P.2d 56 (Cal. 1995)).
193. *Id.*
194. *Id.*
195. *Id.*

ing the amendments to the FEHA. Furthermore, they may have recognized there was no duty to accommodate a disability in § 132a, though such a remedy exists under the FEHA.[196] Finally, the Legislature was no doubt aware that "disability" is defined differently under workers' compensation laws and the FEHA.[197] Given the different definitions, a disabled worker possibly could have a claim under § 132a, but not qualify under the FEHA. For example, a laborer hurts his back at work, but the back injury will heal fully in a few months. If in the meantime he is discriminated against for that disability, he could take action under Labor Code § 132a, but not under the ADA or FEHA, because he does not have a substantial limitation on a major life activity. If the injury will fully heal, he will not remain a "qualified individual with a disability." Thus, it is possible for both remedies to remain open (under both § 132a and the FEHA), depending on the extent and nature of the disability.

The *Cammack* court stated it reviewed the substantial legislative committee reports prepared in connection with the adoption of the amendment to § 12993, and that there was no reference made to the Workers' Compensation Act in general or Labor Code § 132a specifically.[198] Thus it concluded the amendment could not "repeal" § 132a.[199] The *Cammack* court did not understand that § 132a could remain valid, along with the FEHA protections, as alternative remedies.

Besides focusing on the repeal of the pre-emptive provisions of the Workers' Compensation Act, the court also stated that disability discrimination is included in the "compensation bargain."[200] While reviewing the long line of cases where the courts found that certain actions were *outside* the compensation bargain, the court stated they had no doubt the leg-

196. CAL. GOV'T CODE § 12926(k) (West Supp. 1996).

197. Under the ADA, which is followed by the FEHA, CAL. GOV'T CODE § 12926(k) (West Supp. 1996), a "qualified individual with a disability" is a person who has an impairment that "substantially limits a major life activity." 42 U.S.C. § 12102(s)(A) (1995). The person must be able to perform the essential functions of a job currently held or desired, with or without accommodation. *Id.* On the other hand, under Workers' Compensation, work related injuries do not always cause physical or mental impairments severe enough to alter a "major life activity." Many on the job injuries can cause non-chronic impairments which may heal in a certain period of time.

198. *Cammack*, 55 Cal. Rptr. 2d at 851.

199. *Id.*

200. *Id.* at 853.

islature intended the pre-emptive effect of the Worker's Compensation Act to apply to intentional discrimination directed at an employee who seeks the benefits of the workers' compensation system.[201]

> Unlike religious, sexual, or other forms of discrimination, the legislature enacted Labor Code section 132a, which applies specifically to bias directed at the disabled arising out of a workers' compensation claim. This is solely an issue of legislative intent. There can be no doubt that Labor Code section 132a was intended to apply to the discrimination directed at the disabled.[202]

However, the court offered no support for such an assertion. It failed to distinguish the goals of Labor Code § 132a (to protect employees from retaliation or discrimination for disabilities connected with their workers' compensation claim) and the duties to accommodate the disabled under the Fair Employment and Housing Act or the Americans with Disabilities Act. It also failed to note the differences in the definition of disability within the Workers' Compensation Act versus the FEHA. The fatal flaw in the court's reasoning is grounded in its failure to distinguish between disabilities for purposes of workers' compensation (a no-fault system) and disabilities under the civil rights laws. For these reasons, the Court of Appeal for the Second District split in its decision of this very important issue.

Less than six months later, Division 5 of the Court of Appeal for the Second District took a directly opposite position. The *Dillon* court began its discussion by rejecting the notion that disability discrimination is part of the "so-called compensation bargain" of workers' compensation.[203] It recognized that disability discrimination was not within the original compensation bargain.[204] This court expressly rejected the line of reasoning of *Langridge* by pointing out that the court had ignored the important amendment to Government Code § 12993.[205] As a result, the court held that *Langridge* no longer applied.[206]

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201. *Id.*
202. *Id.*
203. *Dillon,* 57 Cal. Rptr. 2d 156 (Ct. App. 1996).
204. *Id.* at 160.
205. *Id.*
206. *Id.* The city claimed the amendment concerned housing laws, not employment laws. *Id.*

The City of Moorpark argued that the plain meaning of the amended statute should be ignored, and that the legislative history behind the amendment should be examined.[207] However, the court said that this argument ignored the "hoary maxim that the plain language of the statute prescribes its interpretation by the courts. When statutory language is clear and unambiguous, there is no need for construction and the court should not indulge in it."[208] The court went on to explain:

> [F]or a refreshing change, [here] is a statute that is clear and intelligible. Its words do not beg to be understood nor do they defy comprehension. The plain meaning of Government Code section 12993 is simply this: should any provision of state law offer less protection than does the FEHA, then such provision is inoperable and effectively pre-empted by the FEHA.[209]

The court, rejecting the logic of the *Cammack* court, stated that if this was not what the Legislature intended to say, then it was for the Legislature to change the statute, not the court.[210] The *Dillon* court affirmed that courts are confined by the nature and scope of the judicial function and its particular exercise in the field of interpretation.[211] They stated that the court cannot rewrite a statute, "neither to enlarge it nor contract it."[212]

The *Dillon* court specifically disagreed with the recent decision of the same district in the *Cammack* case.[213] It stated that although that court arrived at its conclusions through a "painstaking review of the legislative committee reports prepared for the adoption of the amendment to § 12993," that review was unnecessary because § 12993(a) is clear on its face.[214] The statute expressly repeals those provisions of law that offer less protection.[215]

In *Dillon*, the City argued, as an alternative, that the FEHA provides less protections than the Workers' Compen-

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207. *Id.*
208. *Id.*
209. *Dillon*, 57 Cal. Rptr. 2d at 160.
210. *Id.*
211. *Id.*
212. *Id.*
213. *Id.* at 161.
214. *Id.*
215. *Dillon*, 57 Cal. Rptr. 2d at 161.

sation Act.[216] The court refuted this absurdity and concluded that the FEHA laws offer more protection than the Workers' Compensation Act.[217] The *Dillon* court acknowledged that the purpose of the FEHA is to "provide effective remedies which will eliminate discriminatory practices."[218] A party seeking a claim of discrimination under the FEHA has many remedies, including a cease and desist order, actual damages (including back pay and emotional distress), punitive damages, an order for reasonable accommodations, and attorney's fees.[219] They reiterated that civil damages are intended to make whole those persons who have suffered detriment from the unlawful act or omission of another.[220] The civil damages may also include amounts for pain and suffering, loss of consortium, and lost earnings.[221]

The court further explained that workers' compensation benefits provide significantly smaller monetary awards than civil suits.[222] Under Workers' Compensation, injured employees are provided with the following benefits: medical treatment, temporary disability, permanent disability, and death benefits.[223] The court explained that the amount of workers' compensation benefits, other than medical expenses, is determined as a percentage of the worker's earnings.[224] As a result, an injured worker receives less than the total of actual lost wages.[225] Furthermore, nothing is paid to compensate the worker for pain and suffering, nor does the scheme of compensation permit a worker to obtain punitive damages.[226]

Under the provisions of Labor Code § 132a, the Workers' Compensation Act *does* allow a penalty for disability discrimination.[227] The employee will be assessed with a 50% increase in the amount of award of compensation up to the amount of $10,000, lost wages, along with an award of cost

216. *Id.*
217. *Id.*
218. *Id.*
219. *Id.* at 162. *See also* GOV'T. CODE § 12970 (West 1995).
220. *Dillon*, 57 Cal. Rptr. at 162-63.
221. *Id.* at 162.
222. *Id.*
223. The court neglected to name a fifth area of compensation, vocational rehabilitation.
224. *Dillon*, 57 Cal. Rptr. 2d at 162.
225. *Id.*
226. *Id.*
227. *Id.* at 163.

and expenses of up to $250.[228] However, the court explained that this penalty is clearly not as significant as the remedies under the FEHA.[229]

Most importantly, the *Dillon* court recognized that the FEHA specifically allows for remedies to eliminate discriminatory *practices*.[230] For example, the court may order injunctive relief to effect physical changes in the workplace to accommodate a person with a disability.

The *Dillon* court also rejected the *Cammack* court's belief that by following the amendment to the FEHA, the courts would be effectively repealing the effects of § 132a.[231] In *Dillon*, the city argued that if the FEHA offers more protection, then Labor Code § 132a is "superfluous."[232] However, the *Dillon* court explained that § 12993 repeals only the exclusivity provision of workers' compensation law as it applies to workers such as Dillon, who claimed discrimination because of disability.[233] It does not prevent an employee who so chooses from pursuing a claim of discrimination before the Workers' Compensation Appeals Board.[234] There is nothing unusual about the availability of alternative remedies for resolving civil disputes.[235]

The *Dillon* court then reviewed the extensive history of the Americans with Disabilities Act and the state disability laws.[236] The *Dillon* court reiterated that the FEHA unquestionably embodies the fundamental public policy in California, and that the rights of the disabled must be protected at all costs.[237] Permitting an employer to freely discriminate against the disabled, by not allowing for the fullest remedies possible on behalf of the victims, would be "highly offensive to those essential policies that are expressed in the above-mentioned legislation. In light of those policies, the public interest is well served by allowing Dillon, under the facts alleged in her complaint, to proceed with her cause of action."[238]

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228. *Id.*
229. *Id.*
230. *Dillon,* 57 Cal. Rptr. 2d at 162.
231. *Id* at 163.
232. *Id.*
233. *Id.*
234. *Id.*
235. *Id.*
236. *Dillon*, 57 Cal. Rptr. 2d at 164.
237. *Id.* at 165.
238. *Id.*

The Supreme Court should adopt the explicit and implicit rationale of the *Dillon* case, which are as follows: 1) section 132a and the FEHA establish distinct legal remedies based on scope, purpose and remedies;
2) the contrary interpretation of § 132a would undermine the public policies behind the FEHA and the ADA, which is to protect the civil rights of all disabled workers to the fullest extent possible, and
3) the so-called "compensation bargain" should not overreach its original goals by denying disabled workers full and complete remedies.

Justice Antonin Scalia has stated in his recent book, *A Matter of Interpretation: Federal Courts and the Law*, "[i]t is the law that governs, not the intent of the lawgiver."[239] And it is not the job of the courts to divine legislative intent, but to give effect to statutory text, construed neither strictly nor leniently, but "reasonably, to contain all that it fairly means."[240] The *Dillon* court was correct in holding that Government Code § 12993 should apply the plain meaning of the text, and all it fairly means, to protect disabled workers to the fullest extent possible.

IV. CONCLUSION

The *Dillon* court is the first court to fairly consider the parameters of the workers' compensation laws, what it was intended to protect and cover, and the rights of the disabled. The *Dillon* court was indeed courageous. It was not blinded by the language of the "historic compensation bargain" and it looked further at the public policies on which the legislature grounded the Fair Employment and Housing Act and its subsequent amendments. The California Supreme Court is now faced with resolving this conflict among the California Courts of Appeal. Hopefully, it will see fit to put some parameters on the so-called "compensation bargain," and avoid the continued inclusion of conditions that were not originally contained in the bargain. The Supreme Court should effectuate the national policy embodied in the Americans with Disabilities Act and the public policy of the State of California, under the Fair Employment and Housing Act, by ensuring the strongest

239. ANTONIN SCALIA, A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 29 (1996).
240. *Id.* at 23.

remedies possible for victims of disability discrimination, whether disabled on or off the job. California courts should not use the Workers' Compensation Act to shield employers from liability for discriminatory acts taken against disabled employees.